SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1172

JAMES J. LAUGHLIN,

Petitioner,

vs.

CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA,

Respondents.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia is reported in 145 Fed. (2nd) 700.

Jurisdiction

The judgment of the Court of Appeals was entered on November 13, 1944 (R. 35). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Petition for rehearing was denied December 5, 1944. By order of the Chief Justice of the United States the time for filing peti-

tion for writ of certiorari in this Court has been extended to April 17, 1945 (R. 41).

Questions Presented

1. Whether an attorney can be expelled from a criminal trial for filing a petition for the impeachment of a judge.

2. Whether a trial judge can summarily expel an attorney from a criminal trial without affording the attorney the constitutional safeguard of due process of law.

3. Whether the action of a trial judge in expelling an attorney from a criminal trial for filing a petition for impeachment of the judge does not offend the constitutional safeguard of the right of free speech.

Statement of the Case

The statement of the case already appears in the petition and is not again repeated.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that Judge Eicher was justified in expelling petitioner from the sedition trial.

2. In refusing to grant the writ of mandamus and in upholding the action of Judge Eicher.

Argument

In order that the case may be thoroughly understood it is well to refer to the following from the majority opinion:

> "Until July 5, 1944, petitioner represented two of the defendants in that trial. On that day, respondent called upon the attorneys who were concerned in the matter of 'explain or justify or make such showing as they see fit with regard to' the formation by them of a certain 'club, as they see fit to call it,' which seemed 'prima facie at least' to show contempt of the court."

This had relation to the formation of the so-called "Eicher Contempt Club" formed by an attorney from Chicago, Albert W. Dilling, and was based on the fact that Judge Eicher had fined a great number of attorney for contempt of court. Therefore, it will be seen that the subject matter of the discussion for July 5, 1944, had nothing to do with the matter of the impeachment but was confined solely to the proposition as to whether the formation of the "Eicher Contempt Club" amounted to contempt of court. Judge Eicher stated that due to the Nye and Bridges cases in this Court the formation of the contempt club did not constitute contempt of court. Although the only thing being discussed was the matter of the "Eicher Contempt Club" Judge Eicher permitted another attorney, one Ira Chase Koehne, to state that he had filed with the Speaker of the United States House of Representatives opposition to the petition for impeachment filed by petitioner (R. 24). Petitioner when called upon for a statement as to the "Eicher Contempt Club" strenuously objected to the action of Attorney Koehne in going into the impeachment matter and then when petitioner attempted to answer Mr. Koehne and to support his charge of impeachment, was stopped by Judge Eicher. The petitioner said this:

> "That would suffice if your Honor did not permit another attorney, Mr. Koehne, to make certain statements which I cannot, as a matter of personal honor, permit to go unchallenged. I want to say this: It is true that there was an impeachment filed with the Speaker of the House of Representatives. I submit any citizen of the United States, if he is aggrieved has the right to petition for an impeachment of a public officer. * * * So, availing myself when this thing went on day after day and week after week * * *, I felt it was high time that we could appeal to the only tribunal that could take care of such a situation as this, and there was an impeachment filed with the Speaker of

> the House of Representatives. * * * Since you have permitted Mr. Koehne to read a certain portion of the petition for impeachment, I think I ought to have a right to refer to the impeachment itself. It is headed: 'Petition for Impeachment of Edward C. Eicher, Chief Justice of the District Court of the United States for the District of Columbia.' "

At this point respondent said:

> "By the way, Mr. Laughlin, that has nothing to do with the subject matter that the court suggested for discussion this afternoon. The Court had no information as to what Mr. Koehne's remarks were going to be. He was given the privilege to speak in his own defense in regard to the matter that the Court suggested."

It is apparent, therefore, that the only matter to be considered by the court was the "Eicher Contempt Club," and it is apparent from the record that Judge Eicher would not permit petitioner to reply to the remarks made by Attorney Koehne.

A short recess was taken and then when Judge Eicher returned to the bench the following colloquy then occurred:

> "The Court. Now, that brings the court to another matter the Court feels should be explored and determined before the jury returns tomorrow morning, and that is the matter arising in connection with the petition for impeachment of this Court filed by one of counsel, in the case, Mr. Laughlin, with the Speaker of the House of Representatives.
>
> "At this point, the Court offers for the record, a copy of said petition for impeachment, and the Court now calls upon Mr. Laughlin in open court to show cause why he should not be dismissed from further participation in this case as counsel for either of the two defendants heretofore represented by him in the case, and denied further participation in this trial as counsel for the defendant(s).

"Mr. Laughlin, you may be heard.

"Mr. Laughlin. I submit your Honor has no power to call upon me. Any citizen of the United States has a right to petition Congress for the impeachment of any officer of the United States. I exercised the constitutional right given me, and filed with the Speaker of the House, and I am prepared, when the appropriate committee of Congress calls upon me—I have asked that committee—or I have suggested to the Speaker in the petition that it make request of the Department of Justice for the transcript of proceedings in this case so that they can deal more intelligently with the subject matter of the petition. So, I say your Honor is without power at this stage to take any notice. You would be usurping the function of another branch of the Government. That is beyond your power.

"The Court. Is that all you have to say?

"Mr. Laughlin. That is all I have to say.

"The Court. Very well.

"It is the order of this court, Mr. Laughlin, that you are dismissed from this court as an attorney of record for either Mr. Smythe or Mr. Noble, or for any other of the defendants for whom you have heretofore appeared as associate counsel; that you be denied further participation in this case or in the trial of it; that you are ordered to turn over to and to surrender to your successor counsel all papers, documents or matters of evidence in any way affecting the defense of the defendants that you have heretofore represented."

It will be seen, therefore, that petitioner was expelled solely because he filed a petition for the impeachment of Judge Eicher. It is plain that he was expelled for no other reason. The majority opinion says this:

"The petition to the House of Representatives for respondent's impeachment, which petitioner publicly filed while the trial was pending, is in the record. It contains highly derogatory assertions, some of them fantastic, regarding respondent's alleged relation to the

> trial and his alleged conduct of the trial, and is in effect a public profession of contempt for respondent's character. An attorney who publishes such a document during the trial to which it relates should ask to be excused from the trial. His further participation would be useful neither to his client nor to the court and would seriously embarrass counsel, court, and defendants. It is immaterial in this connection whether petitioner's publication is protected by the rights of petition and of free speech or is a criminal attempt to obstruct justice, for his continued participation in the trial would be equally harmful in either case'' (R. 25).

In considering this let us analyze for a moment whether the petition for impeachment contains ''highly derogatory assertions, some of them fantastic.'' The members participating in the majority opinion could not single out any of the allegations in the petition and label them fantastic. We admit in examining the petition for impeachment that it might be difficult to believe that the matters contained therein are true but petitioner says beyond a shadow of a doubt that every allegation could be supported. There is an allegation, for instance, that Judge Eicher had used his judicial office for political purposes in that:

> ''the said Edward C. Eicher, due to his intense dislike for the Honorable Gerald P. Nye, a United States Senator from the state of North Dakota, announced publicly that he would conduct a hearing as to the wisdom of subpoenaing the said Senator Gerald P. Nye, and did so conduct a hearing, with all members of the press present. This was on Thursday, June 22nd. At that time, the said Senator Nye was engaged in a bitter struggle for renomination in North Dakota and therefore the said Edward C. Eicher well knew that the press of North Dakota and the radio would broadcast the fact that in some way or other the said Senator Nye was connected with the sedition case.

"It is well known that the said Edward C. Eicher has made many statements bitterly condemning Senator Nye and in fact condemning anyone who opposes the foreign policy of the Roosevelt Administration."

This charge was not fantastic and could have been supported by ample evidence. The petition for impeachment recited that:

"The said Edward C. Eicher has been guilty of misconduct in office by his arbitrary, tyrannical and abusive attitude in the so-called sedition case. The said Judge Eicher has a definite and fixed opinion, in the view of petitioner, that all defendants in the sedition case are guilty, and it is the view of Petitioner, well supported by the record, that Judge Eicher desires that every defendant be convicted. On this account, the said Judge Eicher has been disregarding the rules of evidence and is permitting the prosecution to introduce into the trial testimony that in no wise relates to the charge in the indictment, that is, that the defendants conspired to undermine the morale of the armed forces" (R. 11).

The petition for impeachment recited:

"That the said Edward C. Eicher is completely under the domination of the prosecutors, O. John Rogge and Joseph W. Burns, and he permits the said Rogge and Burns to conduct themselves in a manner contrary to the accepted practice and without rebuking either of them".

And the impeachment petition also recited this:

"The said Judge Eicher has, since the beginning of the sedition case, sustained practically two objections made by defense attorneys while overruling perhaps five thousand. During the same period of time he has sustained perhaps twenty-five hundred objections made by the prosecution while overruling perhaps two and not more than three."

While it is true that the reading of this may seem to be fantastic, yet the record of the case will positively bear out these allegations.

The petition for impeachment recites this:

> "The said Edward C. Eicher has also been abusive, arbitrary and tyrannical toward members of the defense staff and is constantly banging his gavel in a manner strikingly similar to a heated contest in one of the precinct committees in a bitter political campaign. His purpose, in the view of Petitioner, is to intimidate, browbeat and threaten defense counsel to the extent that they will be fearful to protect the rights of their defendants. The said Edward C. Eicher has also made threats, intimidations and levied fines on various attorneys, and so restricted cross-examination of government witnesses that the members of defense staff have been deprived of their constitutional right to properly defend their clients" (R. 11).

The petition also recited:

> "Charges of bias and prejudice totalling some five or six in number have been filed against the said Judge Edward C. Eicher but he has overruled said affidavits supporting the charges of bias and prejudice" (R. 11).

All of these allegations could be amply supported by the record in the case and by competent evidence.

The majority opinion said this:

> "Petitioner did not stop with publicly filing the petition for impeachment. He voluntarily stated in open court that he had filed it. By clear implication he asserted in open court that its charges were true. In open court he accused the respondent of gross and habitual misconduct in the trial. He invited respondent to consider the crime and punishment of Judge Manton. All this had not even the excuse of relevance to any motion or matter before the court. All this was contempt in the court's presence" (R. 11).

In this respect, either the members participating in the majority opinion were not conversant with the full situation or they misconstrued the facts. The petitioner objected to the impeachment being considered at all. As a matter of fact, the record of the sedition trial shows this, with the petitioner speaking:

> "I submit any citizen of the United States, if he is aggrieved, has the right to petition for an impeachment of a public officer. In fact, the Constitution gives him that right, and, as I say, if he has that aggrievance and he does not exercise the right that the Constitution gives him, then he is not a good citizen. So, availing myself when this thing went on day after day and week after week, and I saw our whole system of justice in the District of Columbia going into chaos and into disrespect, I felt it was high time that we could appeal to the only tribunal that could take care of such a situation as this, and there was an impeachment filed with the Speaker of the House of Representatives.
>
> "Before referring to that further, because I say this is not a forum, this is not the time, this is not the place to try the impeachment. There will be an appropriate committee of Congress, and if the Committee recommends and votes for your impeachment your Honor will have your day in court when tried by the United States Senate. That is the orderly and constitutional way of doing things."

With regard to the expression made as to Judge Manton in the majority opinion, I submit while having no bearing on the issues, has not given a fair and accurate account of that. The records of July 5th show this with the petitioner speaking:

> "Before this trial began, I was never as much as even rebuked as far as I can recall, not even as much as rebuked in the conduct of a case, and my cases have gone into the hundreds. I suppose it is in excess of 2,000, and most of them have been criminal cases.

"Therefore, it would seem strange that in just one trial so many attorneys would go so far astray as to incur the displeasure of your Honor.

"Of course, clearly, we are officers of the court. We have certain personal pride. We have the duty to our defendants. Therefore, if we feel that your Honor is favoring the Government, that is, time after time, you grant every whim and every wish of theirs and at the same time deny the same request that we make, then, of course, we would be less than men if we did not in an orderly and legal way bring that to your Honor's attention.

"Of course, there is the duty on all of us to maintain respect for the courts. We learned that in law school, and I am sure there isn't an attorney here who would not go to great length to try to inculpate that in the citizenry of the United States because, if our courts fail, what have we left? We know in the last ten years many things have happened that has shaken the confidence of the people of the United States to the very foundation. Take, in the case of Judge Manton, who was sent to the United States Penitentiary, which was the worst thing to happen in this country since the British burned the Capitol. No, I say there is a duty on the part of all of us to maintain but, by the same token, the courts must merit that respect and must merit that confidence. I say that certainly all the vice cannot be on one side and all the virtue on the other side."

The majority opinion says this:

"Respondent might, of course, have punished petitioner for this contempt. But petitioner had already been punished twice, once by respondent and once by another judge, for contemptuous conduct in this trial. Respondent turned from punishment to prevention. He might have instituted proceedings for petitioner's disbarment or suspension from practice. He chose a more lenient and more promptly effective course. He exercised only the elementary right of a court to protect

its pending proceedings, which includes the right to dismiss from them an attorney who cannot or will not take part in them with a reasonable degree of propriety."

It should be stated here that the judges participating in the majority opinion committed a grievous error in referring to the other contempts. As a matter of fact, one contempt consisted of Judge Eicher fining petitioner $200 for taking exception to the persistent and wilful banging of the gavel. That was dropped and never pursued. The other contempt was at the time of the filing of this opinion in the court of appeals and is at the present time still on appeal in the United States Court of Appeals. Therefore the majority judges were in error in referring to the merits of that contempt, and, in fact, when that matter was brought to their attention, all the judges participating in the majority opinion promptly disqualified themselves from sitting in the contempt appeal in the court of appeals.

It is submitted that the majority opinion was not supported by law—in fact, it rested on one case—*Brown* v. *Miller*, 52 App. D. C. 330; 286 F. 994. That case merely sets forth the proposition that an attorney employed in the Office of the Alien Property Custodian had the right of access to all documents and files in the office and could be called on by the Custodian to act in his capacity of attorney, and it was held that he sustained the relation of attorney to the Custodian concerning the matters of a corporation seized by the Custodian, with reference to which the attorney had written, received, and examined letters and papers touching the closing up of its affairs. In other words, the matter boiled down simply comes to this: That the court merely held that it could prevent an attorney from appearing for a party where previously the attorney had represented the adverse party with respect to matters in-

volved in the action. That has absolutely no application to the facts of this case. In *Brown* v. *Miller* it should also be pointed out that the attorney was prevented at the outset from appearing. It was also a civil case, not a criminal case. The fact that it had no application is clearly set forth in the dissenting opinion of Judge Stephens. We think the dissenting opinion of Judge Stephens, who was joined by Chief Justice Groner, clearly stated the law. Judge Stephens' opinion says this:—

> "There were proceedings in the District Court on July 5th preceding those set out above. These are referred to in the opinion of the majority and taken into account by the majority in reaching their conclusion. But I think it clear from the entire transcript of the proceedings of July 5th that nothing occurring in that part of the proceedings which preceded what has been set out above was considered by the respondent as a basis for the order of expulsion, but that that order was founded solely upon the filing of the impeachment application by the petitioner. In the light of the whole of the transcript, any other conclusion seems to me to be impossible."

1. *Whether an attorney can be expelled from a criminal trial for filing a petition for the impeachment of a judge:*

We submit that this question has been satisfactorily answered. In fact, there is no case holding that an attorney could be expelled from a criminal case for filing a petition for the impeachment of a public official. As a matter of fact, it is difficult to comprehend such a case. The Constitution affords any citizen the right to request the impeachment of a public official. Petitioner, of course, recognizes and concedes that it is a serious matter, indeed, to petition for impeachment of the very judge presiding in a case. But in the instant matter the petition for impeachment was filed only after the most mature consideration and only

after petitioner believes that there was no other avenue of approach open to him to combat the misconduct on the part of the trial judge. Petitioner realizes and concedes that if a petition is filed to embarrass the trial judge and contains matters that are false, scandalous and derogatory, that immediate steps should be taken to bring the attorney to account in the manner prescribed by law. There is no quarrel and can be none with this sound principle of the administration of criminal justice. As a matter of fact, if it could be held that a judge could expel an attorney from a case solely because he filed a petition for impeachment with the legislative branch of the Government, then we would have a rule of despotism.

2. *Whether a trial judge can summarily expel an attorney from a criminal trial without affording the attorney the constitutional safeguard of due process of law.*

We believe this matter is fully explained in the dissenting opinion of Judge Stephens wherein he stated:

> "There are three measures available to a judge of the District Court in respect of misconduct of a lawyer. (1) The judge may invoke the statutes providing for disbarment or suspension. D. C. Code (1940) Sec. 11-1302 empowers the District Court in general term to censure, suspend from practice, or expel any member of its bar for any crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or any conduct prejudicial to the administration of justice. This remedy must be exercised after the presentation to the court in general term of written charges under oath, and entry by the court of an order fixing a time for a hearing thereon, and service of a certified copy of the charges and order upon the lawyer charged with misconduct. D. C. Code (1940) Sec. 11-1304. (2) The judge may summarily adjudge the lawyer guilty of contempt and punish him by fine or imprisonment. Section 268 of the Judicial Code, 28 U. S. C. Sec. 385 (1940),

provides that the Federal courts 'shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * * '. This remedy is, however, by the same statute limited to misconduct 'in their (the court's) presence, or so near thereto as to obstruct the administration of justice * * * .' And this language has been construed in Nye v. United States, 313 U. S. 33 (1941), to refer to geographic, rather than 'Causal,' proximity. Also, under this remedy, no punishment can be inflicted except the fine or imprisonment specifically provided for in the statute. 'The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negation of all other modes of punishment.' Ex parte Robinson, 19 Wall. 505, 512 (U. S. 1874). Mullen v. Canfield, 70 App. D. C. 168, 105 F. (2d) 47 (1939). (3) The judge may exercise the inherent power of a court to keep order and to insure fair trial. This court recognized that power in Brown v. Miller, 52 App. D. C. 330, 286 Fed. 994 (1923). There the court held that it was within the power of the then Supreme Court of the District of Columbia (now the District Court of the United States for the District of Columbia) to exclude a member of the bar from acting as attorney for one party to a case where it was made to appear that he had theretofore, as attorney for the opposite party, received confidential information concerning matters involved in the case, and that he was using the same therein to the prejudice of his former client; and the court held that the trial court's power thus to exclude an attorney existed apart from the rules relating to disbarment proceedings. Other circumstances wherein this inherent power might be exercised readily occur to mind: for example, where a lawyer in disorderly manner continuously interrupts and interferes with the progress of a trial. In such circumstances, while either the remedy of contempt or of general disbarment or both might be appropriate, they might, as in Brown v. Miller, be inefficacious. In some circumstances nothing but an attorney's removal will immediately accomplish a fair and orderly trial."

Then Judge Stephens said this:

> "But I think it clear that the action of the respondent in the instant case cannot be justified as an invocation of any of the three measures which have been described above as available to a trial judge in respect to the misconduct of a lawyer. The order excluding the petition from further participation in the particular criminal case was not the action of the District Court in general term as provided for in D. C. Code (1940) Sec. 11-1302 and did not follow the procedure required by D. C. Code (1940) Sec. 11-1304."

The majority opinion treated the matter as one of contempt but the matter could not be one of contempt. Judge Stephen's opinion said this:

> "The order of exclusion was not an adjudication of contempt and did not impose the type of penalty permissible for contempt. Indeed the remedy of contempt could not properly have been invoked because the act which occasioned the respondent's order, i.e., the filing of a paper with the Speaker of the House of Representatives requesting the respondent's impeachment, was not committed 'in their (the court's) presence, or so near thereto as to object the administration of justice * * *,' within the meaning of that language as construed by the Supreme Court."

Judge Stephens said further:

> "The plain fact, under the record upon which the respondent's order of expulsion was made, is, in my view, that the order was in the nature of a penalty imposed upon the petitioner for filing the impeachment application."

3. Whether the action of a trial judge in expelling an attorney from a criminal trial for filing a petition for impeachment of the judge does not offend the constitutional safeguard of the right of free speech.

We believe that the case of *Bridges* v. *Calif.*, 314 U. S. 252, stands for the proposition that the orderly process of justice cannot be exercised in such a manner as to limit the constitutional rights, such as the right of free speech. Of course, it is recognized that there would be an exception where there is a "clear and present danger" to the process of justice but Judge Stephens pointed out that on the present record the filing of the impeachment petition did not constitute a "clear and present danger."

It is submitted, therefore, considering all aspects of the case, that petitioner's expulsion from the sedition trial was solely because he filed a petition for the impeachment of Judge Eicher and that Judge Eicher was without power to expel him on this account.

Is This Case Moot?

When Judge Eicher died and the sedition case ended in a mistrial it was the view of many persons that this case then became moot. However, upon more mature reflection it was the view of petitioner that the case was not moot. The sedition indictment is still outstanding and the Government has announced its intention to retry the case. Many of the defendants desire the services of petitioner. Accordingly, certain preliminary motions were filed on behalf of various defendants. On March 15, 1945, the Honorable T. Alan Goldsborough, sitting in Criminal Court No. One, District Court of the United States for the District of Columbia, ruled that petitioner could not participate further in the sedition case and that the order of Judge Eicher was binding on him as well as the affirmance of Judge Eicher's order by the Court of Appeals and that it was binding until such time as it was reversed by this Court. Accordingly, the Clerk of the District Court of the United States on March 15, 1945, entered the following order:

"James J. Laughlin, Attorney, is denied further participation in this case (See United States Court of Appeals for the District of Columbia, Misc. No. 71, Laughlin v. Eicher, dated 11/13/44).

(See Appendix 1).

Conclusion

In view of all the circumstances, petitioner says that the order of the Court of Appeals denying the writ of mandamus was in error and should be reversed.

JAMES J. LAUGHLIN,
National Press Building,
Washington, D. C.,
Petitioner in Proper Person.